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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. DAVID BRIAN BERNEL II, Defendant and Appellant.	C060988 (Super. Ct. No. SF104026A)

Defendant David Brian Bernel II killed his girlfriend, Jennifer Bushnell. The jury convicted him of first degree murder (count 1, Pen. Code, § 187), found he intentionally and personally discharged a firearm, causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)), and found he possessed a firearm after a felony conviction (count 2, Pen. Code, § 12021, subd. (a)). The trial court found defendant had a strike and a serious felony conviction. (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 1170.12.) The trial court sentenced defendant to prison for 80 years to life, and defendant timely appealed.

On appeal, defendant contends the trial court should not have given a pattern instruction on hallucinations, CALCRIM No. 627. When read with other instructions, the effect of CALCRIM No. 627 is to limit the jury's consideration of hallucinations to the issue of whether a defendant premeditated or deliberated a killing, so that hallucinations may be used by the defense to show a murder was second degree murder, rather than first degree murder, but cannot be used to negate malice by bolstering a claim of imperfect self-defense, and thereby reduce a murder to manslaughter. (See *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 (*Mejia-Lenares*); *People v. Padilla* (2002) 103 Cal.App.4th 675 (*Padilla*).) Defendant contends that the instruction was not supported by the facts at trial, and that it improperly defined hallucinations in such a way that impaired his claim of imperfect self-defense.

We shall find there was substantial evidence defendant was hallucinating when he shot Bushnell; therefore, the trial court properly instructed on hallucinations. Further, we shall conclude the pattern instruction, CALCRIM No. 627, did not define hallucinations so as to undermine defendant's defense. Finally, we shall conclude that any error was harmless on these facts.

Accordingly, we shall affirm the judgment.

BACKGROUND

Defendant admitted he killed Bushnell on February 20, 2007, but sought to reduce his culpability by showing he killed her because he thought she was signaling to assassins to kill *him*.

Because defendant's testimony largely coincided with the prosecution evidence, we blend it into our factual recitation.

Defendant testified he loved Bushnell, but they had a dysfunctional relationship based on their "fast" life as drug dealers, and they were physically abusive toward each other. He usually obtained 20-pound loads of high-grade marijuana from Humboldt County growers and would sell it in central or southern California, such as in Fresno. He would then buy methamphetamine and bring it back to sell in Humboldt County. The growers would "front" the marijuana, and defendant netted about $500 per pound, or $10,000, for the marijuana. He would do several runs per week, using methamphetamine to stay awake.

Defendant had several guns for protection, including the one that he used to shoot Bushnell, and Bushnell had a "girly girlish" gun that she carried in her purse.

During one trip in January 2007, some Hispanic gang members—"'eses'"—took a 20-pound load of marijuana without paying for it. This represented a $10,000 loss to defendant and Bushnell, but a $60,000 loss to the growers. Defendant did not want to see the growers until he had made back the money because of the likely adverse consequences. As he testified: "There was no talking it out or anything like that."

When defendant picked up more marijuana, Bushnell was kidnapped, threatened, and then released, but the perpetrators took her cell phone, which had crucial telephone numbers in it. Defendant obtained more marijuana and picked up Bushnell, but

defendant was arrested. He made bail on February 12 or 13, 2007.

Bushnell's mother testified her daughter called on February 12, 2007, to say she "was tired of all the crazy things that were happening and that she just wanted to get back to her normal life. Get a normal job." Her daughter was afraid of defendant, but loved him.

Defendant testified that after he made bail, the couple decided to make another run, so they got more marijuana in Laytonville, then went to his mother's house in Kingsburg. Defendant testified that between then and when he shot Bushnell, he did not sleep because of "severe methamphetamine use." Defendant dropped Bushnell at his mother's house and went to sell marijuana. This was the day before a SWAT incident.

Defendant's mother, Joann Bernel, told an investigator that defendant had delusions he was a drug kingpin. Beginning in December 2006, Bushnell stayed at her house for periods of time, sometimes with defendant and sometimes by herself.

On February 17, 2007, Bushnell told Joann Bernel that defendant was in trouble because someone had stolen marijuana they had been fronted. Bushnell said that she had been kidnapped in Humboldt County because of this problem. Bushnell had a gun. Bushnell told defendant's mother that defendant had hit her. Bushnell was "[u]p and down" that night, concerned about people watching the house, and Joann Bernel had seen a woman watching the house about three days before.

The next morning, when Joann Bernel got up, she saw defendant asleep in the garage. Bushnell took breakfast out to defendant, and Joann Bernel heard Bushnell and defendant arguing. Eventually, defendant displayed a shotgun, stating "everybody was after him and nobody was leaving the house," and he was "going to shoot me and shoot her." "He was foaming at the mouth. His eyes were bulged to where they were going to pop out. It wasn't him. It was the devil." In the past, when defendant used methamphetamine, his mother could see how it changed his behavior; it made him "[h]yper" and "[p]aranoid." This time, he seemed insane from drugs, worse than she had ever seen him. Defendant dragged Bushnell screaming into the garage, and Joann Bernel fled with her daughter to a neighbor's house to call 911. A SWAT team responded to her house.

Defendant testified he suspected that he was being followed, and that his mother had told him she had seen people watching her house. Defendant testified he was "tweaked out on crank," infuriated, "And I thought everybody was out to -- was against me." Before this, he had learned from friends that while she had been kidnapped, Bushnell had talked against him. He admitted pointing a shotgun at Bushnell and saying he would blow her head off. He also hit her once with the shotgun and she fell, causing a bruise later found on her tailbone.

Defendant testified that after his mother ran out of the house with his sister, he and Bushnell walked to the river and watched the SWAT team set up.

Eventually, defendant arranged to buy a Honda for them to use.

Defendant testified he thought the authorities were after them. He also testified he was "[s]everely" using drugs during this period. He used about an ounce every three days in this period, but later testified it was an ounce every four to five days.

Defendant testified he and Bushnell drove to a friend's house in Riverbank, with defendant still using methamphetamine. Three men showed up, and defendant assumed his friend had learned he was wanted by the Humboldt drug growers, which made defendant nervous. When asked how he was feeling then, defendant testified, "The longer you are awake, the more your mind wanders."

Although they had planned to stay overnight, defendant and Bushnell left, and when the three men began to follow them out, defendant became more suspicious. As they were leaving the house, Bushnell cut her finger on razor wire. She was bleeding "pretty good" but defendant wanted to get away from that house, so he drove about 30 minutes toward Flag City. He was speeding because he thought the men were following him. While he was "tweaking" in the car, Bushnell pointed her gun at him and screamed, he slammed on the breaks, and her head hit the windshield. Defendant did not want to stop, but he was running low on gas.

Shortly after midnight on February 20, 2007, Sonia Mesa was the cashier at the Flag City truck stop, near the intersection

of Highway 12 and Interstate 5, west of Lodi. Defendant asked for $30 worth of gas, but when Mesa walked toward the counter, "He just kind of laughed a little to himself" and ran outside. She heard a noise and looked outside. She saw a woman yelling at defendant, "And then he had a gun in his hand and I heard another noise and she kind of went to the floor, a little slowly[.]" Mesa got scared and called 911.

A customer heard three shots, then saw a man he believed to be defendant get into a car and drive away. The customer testified that he heard "an extremely short pause" between the first shot and the other shots.

The gas station owner testified that he showed peace officers some images from his camera system, and he prepared a CD capturing those images. Four gunshots could be heard when the owner and the officers viewed the original, but the audio signal could not be transferred to the CD. However, a detective recorded the audio signal onto a handheld recorder, and the detective testified he could hear four gunshots, "two distinct gunshots, and then the following two, the last two, were very rapid in succession." This matched the four shell casings recovered at the scene. The detective also saw two marks on the concrete that appeared to be recent bullet strikes, and he found fragments consistent with a bullet striking concrete.

Defendant testified he and Bushnell were arguing when he pulled into the gas station, and Bushnell had her gun with her. Defendant was "high" at this point and still thought people were following him. He put $30 on the counter for gas and then saw

Bushnell get out of the car, so he ran outside. She was waving her hands and yelling "'I'm done'" and "'I'm going to get these mother fuckers off my ass right now.'" Defendant testified: "She was waving. And I kind of see some motion over here on the side, I thought she was running towards them. I thought they were there at the time. And I -- I thought they were going to kill me." "I figured, you know, hey, either she's going to kill me or they are going to kill me, either way. Because she wanted this over now. We just had that argument. . . . She just wanted this over with. She wanted these people off her ass. She didn't care what was going -- anything about me anymore. So she was going to help them out."

Defendant described "[t]weak" or "crank monsters," "things that aren't there. You see them, but they are not really there. Like shadows moving, things running, people in trees." He stated that being "spun out" was "a feeling that you can't really describe. It's . . . like being another person. It's like an alter ego of sorts." He testified "my mind wasn't working right at that time."

After watching the camera images from the gas station, defendant testified he now knows Bushnell was not armed when she was out of the car. He then testified as follows:

"Q. Okay. At the time you thought she was waving something and you thought you saw a movement, right?

"A. Correct.

"Q. Do you think that was one of these hallucinations, sort of movement things or --

"A. Yes, I do.

"Q. In retrospect?

"A. Now that I look back at things and I -- I understand that, you know, that that possibly -- that didn't happen. You know, it was [a] figment of my imagination. It was my mind running off from me. I didn't know what was going on. At the time, all I thought was, I'm going to die. This is it. These guys have caught back up with me."

Defendant testified that because he thought he was going to be killed, he shot Bushnell. The first shot was from about 20 feet away. He denied shooting her while she was on the ground. He conceded the camera does not show him looking around for any other people, and he explained: "I was more worried about getting out of there at the time. Like I said, I saw a motion over to the side, my peripheral vision. [All] I see is a slight movement and if that is -- so I'm trying to get out of there as soon as possible."

The CD exhibit depicting the images from the gas station cameras shows a series of discrete images with noticeable breaks, so that the motion is jerky. However, it shows defendant approaching Bushnell, then she falls out of sight behind a cleaning station, consistent with having been shot from about 20 feet, as defendant testified. Then defendant walks toward her and points down, consistent with shooting her while she was on the ground, as corroborated by the fresh bullet marks in the concrete.

The pathologist who conducted the autopsy on Bushnell testified that Bushnell had three gunshot wounds, one into the left chest exiting the right upper back, one into the right breast through the chest and out through the right upper arm, and one through her left forearm. She also had minor bruises around her neck and cheeks, and bruises several days old on her hips and lower extremities. The neck wound "was indefinite, probably a few days old." She also had a bruise in her tailbone area that was several days old. There was a jagged wound on her left little finger that looked fresh and would have bled a lot. She had a blow to the mouth that "[c]ould have happened right before she was shot or several hours before." The pathologist did not note any missing hair, but testified he might not have noticed if a small patch was gone. Bushnell had no drugs or alcohol in her blood.

After shooting Bushnell, defendant fled, and in doing so drove his Honda into some berry bushes about a half-mile from Flag City. A criminalist found blood inside and outside of the Honda, and a clump of human hair on the passenger seat that had been "forcibly removed." The gun used to kill Bushnell was found in a grassy area near the shoulder of Highway 12 near Flag City.

Eventually, with the aid of others, defendant fled to Mexico.

Defendant had felony convictions for first degree burglary in 1997 and second degree burglary in 1999.

Dr. Christina Antoine, a defense psychiatrist, testified about the effects of methamphetamine, but had not examined defendant. She testified hallucinations can be hearing, seeing or feeling things that are not true. Methamphetamine has toxic effects on the brain and can cause psychosis, or can exacerbate a person's existing mental illness. Long-term use can cause permanent changes in brain chemistry, so that stopping the drug may not stop its effects. "[M]ethamphetamine intoxication" (psychotic disorder secondary to methamphetamine) can appear similar to schizophrenia and can cause visual and auditory hallucinations and delusions, as well as paranoia. Methamphetamine use can cause drooling and possibly foaming at the mouth.

Defendant's former girlfriend testified that sometimes defendant would be "spun" on methamphetamine, but she had not seen him in about two years.

The prosecutor's closing argument emphasized that this was a cold, calculated, killing: Defendant first shot Bushnell from 20 feet away, then walked up and shot her while she was on the ground, after having threatened to kill her before. The prosecutor noted that defendant did not look around, arguing this meant defendant did not really believe there were killers lurking in the area. Defense counsel argued imperfect self-defense at length and emphasized defendant's methamphetamine-fueled perceptions. In rebuttal, the prosecutor argued no evidence corroborated defendant's story, he was lying, and he had not been delusional.

After deliberating for about two and a half hours, the jury convicted defendant of first degree murder, found he intentionally and personally discharged a firearm, causing great bodily injury or death, and possessed a firearm after a felony conviction. (Pen. Code, §§ 187, 12022.53, subd. (d), 12021, subd. (a).)

The trial court found true the allegations that defendant had a prior serious felony conviction that also qualified as a strike. (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 1170.12.) The trial court sentenced defendant to 25 years to life for murder, doubled to 50 years to life for the strike, added 25 years for the firearm allegation, and added another five years for the serious felony allegation, for a total of 80 years to life. The trial court imposed but stayed (Pen. Code, § 654) a midterm sentence of two years, doubled to four for the strike, for the firearm possession count.

Defendant timely filed his notice of appeal.

DISCUSSION

Defendant contends the trial court should not have instructed the jury with CALCRIM No. 627 regarding hallucinations. He contends there was no evidence of hallucinations, as he defines them, and that the instruction impaired his claim of imperfect self-defense.

Defendant begins with the proposition that hallucinations are defined as perceptions with *no* basis in reality. He then reasons that because his alleged misperceptions preceding the killing had *some* basis in reality, they were not hallucinations,

as defined. Therefore, he initially concludes *no* instruction on hallucinations should have been given.

From this initial conclusion, defendant contends that the instruction that was given caused prejudice in two different ways. First, he contends that the instruction would cause the jury to discount the effect of "all forms of objective but unreasonable beliefs" on the issue of imperfect self-defense. Second, he contends the jurors may have concluded "that *only* hallucinations along the spectrum of honest-but-objectively-unreasonable beliefs 'may' be considered by the jury in its resolution of the questions of premeditation and deliberation."

As we shall explain, we disagree with the contention that the fact a hallucination has some connection to reality means it is not a hallucination. Because the trial record contains substantial evidence that defendant had hallucinations, we shall conclude the trial court properly instructed the jury on how those hallucinations could and could not affect defendant's culpability. (See *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054 [trial court must instruct on defense "if substantial evidence supports the defense"].) As we shall further explain, the instruction on hallucinations that the trial court gave did not improperly limit defendant's claim of imperfect self-defense. Finally, we shall conclude any error was harmless.

We shall first explain how the challenged instruction related to other relevant instructions given. Then we shall address defendant's contention that there was no substantial evidence of hallucinations. Then we shall address defendant's

subsidiary contentions that the instruction that was given prejudiced his claim of imperfect self-defense.

I. Instructions Given

The jury was given pattern instructions defining murder, including (per CALCRIM No. 521), the People's burden to prove defendant "acted willfully, deliberately, and with premeditation. [¶] The defendant acted willfully if he intended to kill. [¶] The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. [¶] The defendant acted with premeditation if he decided to kill before committing the act that caused death."

Based on defendant's testimony that he thought he was being stalked by killers, and at defendant's request, the trial court instructed the jury on imperfect self-defense, including the People's burden to prove beyond a reasonable doubt that defendant was *not* acting in imperfect self-defense. (CALCRIM No. 571.) The jury was instructed that if defendant actually believed he was in imminent danger and actually believed he needed to use deadly force to protect himself, but at least one of those beliefs was objectively unreasonable, he was not guilty of murder, but instead was guilty of voluntary manslaughter. In particular, the jury was instructed, "In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant."

The jury was then instructed (CALCRIM No. 625) that voluntary intoxication could be used to negate intent to kill,

deliberation or premeditation, or to show unconsciousness, but could not be used for any other purpose.

The jury was then instructed with CALCRIM No. 627, as follows:

"A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he is seeing or hearing or otherwise perceiving something that is not actually present or happening. You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first-degree murder."

The jury then was instructed (CALCRIM No. 3428) that evidence of a mental defect or disorder could be considered "only for the limited purpose of deciding whether at the time of the charged crime the defendant acted or failed to act with the intent or mental state required for that crime."

II. Definition of Hallucinations

The pattern instruction given in this case, CALCRIM No. 627, defines a hallucination as "a perception not based on objective reality." Defendant does not quarrel with that definition as such, but he interprets it to mean that if a misperception has *any* basis in reality, it is not a hallucination. Because, in his view, his misperceptions at the time of the killing had some basis in reality, they

were not hallucinations. Therefore, he reasons, no instruction on hallucinations was warranted in this case. We disagree.

In *Padilla*, *supra*, 103 Cal.App.4th 675, the trial court precluded the defendant from introducing evidence of hallucinations to show he was provoked. *Padilla* noted that, to reduce a murder to manslaughter, provocation must be the kind that would arouse the passions of an ordinarily reasonable person, but a person's subjective arousal may reduce a first degree murder to second degree murder, by negating deliberation or premeditation. (*Id.* at p. 678.) *Padilla* then stated:

"A hallucination is a perception with no objective reality. (American Heritage Dict. (4th ed. 2000) p. 792 ['[p]erception of visual, auditory, tactile, olfactory, or gustatory experiences *without an external stimulus*' (italics added)]; Oxford English Dict. (2d ed. 1989) p. 1047 ['apparent perception (usually by sight or hearing) of an external object *when no such object is actually present*' (italics added)]; Webster's 3d New Internat. Dict. (1986) p. 1023 ['perception of objects *with no reality*' (italics added)].) A perception with no objective reality cannot arouse the passions of the ordinarily reasonable person. [Citation.] Failing the objective test, Padilla's hallucination cannot as a matter of law negate malice so as to mitigate murder to voluntary manslaughter--whether on a 'sudden quarrel or heat of passion' theory of statutory voluntary manslaughter [citations; fn. omitted] or on a 'diminished actuality' theory of nonstatutory voluntary manslaughter[.]

"On the other hand, nothing in the law necessarily precludes Padilla's hallucination from negating deliberation and premeditation so as to reduce first degree murder to second degree murder, as that test is subjective. [Citations.] On that ground, we hold that the court's order rejecting his proffer of evidence was error." (*Padilla*, *supra*, 103 Cal.App.4th at pp. 678-679.)

In *Mejia-Lenares*, *supra*, 135 Cal.App.4th 1437, there was evidence that Mejia-Lenares killed his victim because of a delusion that the victim was the devil and wanted to kill him. (*Id.* at p. 1444.) The court concluded that delusions alone cannot support a claim of imperfect self-defense. (*Ibid.*)

Mejia-Lenares framed the issue as "whether a belief that one is in danger of imminent harm, founded upon a delusion alone, can support a claim of imperfect self-defense." (*Mejia-Lenares*, *supra*, 135 Cal.App.4th at p. 1447.) After tracing the development of the law of insanity, and the abrogation of the diminished capacity defense (*id.* at pp. 1447-1453), the court concluded that "imperfect self-defense remains a species of mistake of fact [citation]; as such, it cannot be founded on delusion. In our view, a mistake of fact is predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality.[Fn.] A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality. That may be insanity, but it is not a mistake as to any fact." (*Id.* at pp. 1453-1454.)

Later, *Mejia-Lenares* stated: "To allow a true delusion—a false belief with no foundation in fact—to form the basis of an unreasonable-mistake-of-fact defense erroneously mixes the concepts of a normally reasonable person making a genuine but unreasonable mistake of fact (a reasonable person doing an unreasonable thing), and an insane person. Thus, while one who acts on a delusion may argue that he or she did not realize he or she was acting unlawfully as a result of the delusion, he or she may not take a delusional perception and treat it as if it were true for purposes of assessing wrongful intent. In other words, a defendant is not permitted to argue, 'The devil was trying to kill me,' and have the jury assess reasonableness, justification, or excuse as if the delusion were true, for purposes of evaluating state of mind.

"To hold otherwise would undercut the legislative provisions separating guilt from insanity. Allowing a defendant to use delusion as the basis of unreasonable mistake of fact effectively permits him or her to use insanity as a defense without pleading not guilty by reason of insanity, and thus to do indirectly what he or she could not do directly while also avoiding the long-term commitment that may result from an insanity finding. If a defendant is operating under a delusion as the result of mental disease or defect, then the issue is one of insanity, not factual mistake. To allow a mistake-of-fact defense to be based not on a reasonable person standard but instead on the standard of a crazy person would undermine the

defense that is intended to accommodate the problem." (*Mejia-Lenares*, *supra*, 135 Cal.App.4th at pp. 1456-1457.)

Defendant testified about imaginary "crank monsters" and admitted that although he thought Bushnell had a gun and was signaling to killers, she did not have a gun and no killers were present: "You know, it was [a] figment of my imagination. It was my mind running off from me." Defendant testified he was using large amounts of methamphetamine and not sleeping in the days before the killing, and his expert testified that methamphetamine usage can cause hallucinations.

It is difficult to see how any trial court would *not* have concluded the evidence justified instruction on hallucinations.

But, parsing the definition of hallucinations finely, defendant contends the evidence did not support the instruction because what defendant thought after he watched the videotape "did not convert his misinterpretation of events into a perception with no basis in 'objective reality,' *to wit*: 'without an external stimulus.'" Defendant contends he had "objectively[]unreasonable, mistaken beliefs" that "were rooted in reality" or had "a basis in reality." Elsewhere he characterizes his hallucinations as "'lesser'" delusions that "did have a basis in reality. Accordingly, CALCRIM [No.] 627 should not have been heard by [defendant's] jury, as it did not apply to the facts of his case."

In short, defendant contends that because what he claimed he perceived had *some* basis in reality, his perception did not fit the instruction, which defined a hallucination as "a

perception not based on objective reality." (CALCRIM No. 627.) For example, because *Mejia-Lenares* speaks of "a delusion, unsupported by any basis in reality" (*Mejia-Lenares, supra,* 135 Cal.App.4th at p. 1454) and "a false belief with no foundation in fact" (*id.* at p. 1456), defendant infers that if there is *any foundation in fact,* a hallucination is precluded. We disagree.

It is true that defendant weaved some objective facts into his purported hallucinations. For example, he testified that Bushnell did have a gun in the car, she did get out of the car and gesture to him while shouting, they were in trouble with the Humboldt County marijuana growers, and he claimed to be fleeing from three strange men he associated with those growers. Such evidence, if believed, could provide an objectively reasonable *background* to his hallucinations. But it did not convert his hallucinations into something else. This background evidence did not place a gun in Bushnell's hand, nor assassins at the gas station.

Under defendant's interpretation, unless a hallucination was so complete as to supplant *all* objective reality, it would not qualify as a hallucination. That is an unduly crabbed definition. Few persons—even profoundly insane persons—have *no* contact with reality. For example, Padilla wanted to introduce evidence at the guilt phase of his trial "that he committed a retaliatory homicide after hallucinating that [the victim] had killed Padilla's father and brothers." (*Padilla*, *supra*, 103 Cal.App.4th at p. 677.) Under defendant's interpretation,

if Padilla *really had* a father and brothers, that connection to objective reality would disqualify Padilla's misperception as a hallucination. That is not a reasonable interpretation of the meaning of a hallucination, and does not reflect the usage of the term in *Padilla*.

Defendant points to a passage in a learned treatise distinguishing "'bizarre delusions' in relation to schizophrenia, and 'nonbizarre delusions' in relation to delusional disorder." Purportedly, the former are "'clearly implausible'" while the latter "'involve situations that can conceivably occur in real life.'" We fail to perceive the relevance of this passage. We accept that the distinction between different kinds of delusions may be useful in diagnosing what kind of mental disorder a person has. But for purposes of this appeal, it would not matter whether defendant was schizophrenic or had a delusional disorder. The fact remains, he testified he saw things that did not exist.

In short, although the instruction says a hallucination is "a perception not based on objective reality" (CALCRIM No. 627) we reject defendant's interpretation of this to mean that *any* connection to "objective reality" disqualifies a misperception as a hallucination. Because there was substantial evidence that defendant was hallucinating at the moment he killed Bushnell, the trial court properly instructed the jury on the legal effect of hallucinations on a defendant's mental state.

III. Effect of Instruction on Imperfect Self-Defense

Although we have rejected defendant's predicate contention that there was no substantial evidence of hallucinations, we also address his specific attacks on CALCRIM No. 627.

"In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights." (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

First, defendant contends the jury might think "all forms of objective but unreasonable beliefs were excluded from the jury's resolution of the issue of imperfect self-defense." We disagree.

CALCRIM No. 627, as given, in part states "You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Contrary to defendant's assertion, nothing in this instruction can be read to apply to "forms of objective but unreasonable beliefs" *other than* hallucinations. There is no reasonable likelihood that the jury would interpret the instruction as defendant posits.

Second, defendant argues the jury might think "that *only* hallucinations along the spectrum of honest-but-objectively-unreasonable beliefs 'may' be considered by the jury in its resolution of the questions of premeditation and deliberation. Accordingly, jurors could have concluded that [defendant's] objectively unreasonable beliefs--grounded as they were in reality--'may not' be considered on premeditation and deliberation." Again we disagree.

In part, this contention assumes the jury would apply the same crabbed view of "hallucination" as defendant tendered, and which we have already rejected. The jury would understand that this instruction was directed at the evidence of defendant's misperceptions at the time of the killing, namely, that he thought Bushnell had a gun and was signaling to assassins.

Further, the instruction in part states "You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation." (CALCRIM No. 627.) It does not state or imply that the jury could not consider other types of evidence in deciding whether defendant acted with deliberation and premeditation. Again, we find no reasonable likelihood that the jury would interpret the instruction as defendant posits.

Accordingly, we reject defendant's subsidiary contentions that the instruction, as given, impaired his defense.

Finally, defendant's claims of instructional error in effect assert that the instruction as given impaired his ability to obtain a conviction on a lesser offense, such as second

degree murder or manslaughter. But "in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*]*Watson*[(1956) 46 Cal.2d 818]. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson*, *supra*, 46 Cal.2d 818, 836)." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) Although defendant argues that the federal standard of prejudice applies, he relies on a dissenting opinion in *Breverman*. We must follow the majority opinion. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The evidence of defendant's guilt of first degree murder was overwhelming. He had threatened to blow Bushnell's head off a few days before, at his mother's house. Based on the gunshot wounds and bullet strikes in the concrete, as well as the camera images, defendant shot Bushnell from a distance, then walked up to her after she fell and shot directly into her again. He then fled. As the prosecutor argued, the fact that defendant did not look around as he approached Bushnell undermined his claim that he actually was in fear, because if he had honestly thought that Bushnell was signaling to assassins, he would naturally have been looking around to check for danger. His claim that he

actually thought Bushnell was armed and was signaling to assassins when he shot her lacked any direct corroboration. The fact he was a twice-convicted felon cast doubt on his credibility, and the fact he was on trial for first degree murder gave him a strong motive to fabricate his claim that he was hallucinating due to methamphetamines.

On these facts, even if we agreed the jury could reasonably have misinterpreted the instruction as defendant suggests, we would find that any error was harmless.[1]

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.

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[1] The recent amendments to Penal Code section 4019 do not apply to defendant because he was convicted in this case of a serious felony. (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) Murder qualifies as a "serious" felony. (Pen. Code, §§ 187, 1192.7, subd. (c)(1); see *id.*, § 2933.2.)